CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 155.

WILLIAM J. DOYLE AND JAMES G. DOAK, TRADING AS AS DOYLE & DOAK,

vs.

LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED DECEMBER 4, 1905.

(20,002.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1906.

1 In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM J. DOYLE and JAMES G. DOAK, Trading as Doyle & Doak, Citizens of Pennsylvania, Plaintiffs in Error,

vs.

LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, a Corporation and Citizen of Great Britain, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. E. Clinton Rhoads, for Plaintiffs in Error.
Mr. Thomas Raeburn White, for Defendant in Error.

Before Acheson, Dallas and Gray, Circuit Judges.

Sur Certified Question of Law.

This cause has been brought to this Court by writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment against the defendants below in an action at law adjudging them guilty of contempt of Court and imposing upon them a fine enforceable by imprisonment.

The London Guarantee and Accident Company, Limited, a corporation and citizen of Great Britain, brought an action of assumpsit in the Court below against William J. Doyle and James G. Doak, citizens of Pennsylvania. In that action, in compliance with the petition of the plaintiff filed therein, the Court made the following order:

"And now, June 25th, 1904, the Court orders the defendants to produce, within twenty days, in the office of the Clerk of said Court, their pay-sheets, time books, cash books and all other books of original entry which contain information as to the amount
2 of compensation paid to employees of themselves or of their sub-contractors, or of any other persons contemplated in the contracts upon which suit is brought in this case, during the period of said contracts as set forth in the petition filed."

Thereafter the plaintiff presented to the Court a petition alleging disobedience by the defendants of the above order, and praying that an attachment issue against them for contempt of Court. Thereupon the Court granted a rule upon the defendants to show cause why an attachment should not issue against them for contempt of Court by reason of their violation and disobedience of said order. To this rule the defendants filed an answer under oath denying intentional non-compliance with said order and stating that they were not able to produce all the books and papers called for, because upon a thorough search the absent ones could not be found, and averring their belief that they were accidentally lost or by mistake were destroyed at a

time when alterations were made in their office and a removal of its contents to another place occurred. Subsequently, to-wit, on January 3rd, 1905, upon the hearing of the rule, the Court gave and entered judgment that the "defendants are guilty of contempt in disobeying the order referred to;" and further adjudging as follows:

"If the defendants produce in the office of the Clerk of the Circuit Court on or before January 15, 1905, the ledger of 1902-4, the pay-rolls or time-sheets, from March to May 28, 1903, and the cash-book from May 28 to December 1, 1902, or if they produce the cash-book alone, they are ordered to pay no more than the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment, to suffer imprisonment
3 in the jail of this county for the period of sixty days. If the foregoing books and papers are not produced on or before January 15, the defendants are ordered to pay a fine of two hundred and fifty dollars, and also the cost accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment to suffer imprisonment in the jail of this county for the period of sixty days."

Thereupon the defendants applied to the Court below for the allowance of a writ of error for a review by this Circuit Court of Appeals of said judgment and the writ was allowed by the Circuit Court and has been sued out and the record filed in this Court.

Such being the material facts and this Court desiring the instruction of the Honorable the Supreme Court of the United States for the proper decision of the subjoined question of law thereon arising, it is now ordered that the following question (together with the foregoing statement of facts) be and the same is hereby certified to the Supreme Court.

Has the Circuit Court of Appeals jurisdiction upon the writ of error sued out by the defndants to review the above recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of Court in disobeying the above recited order of Court of June 25th, 1904, and imposing upon the defendants a fine of $250 on the specified condition and terms?

Witness our hands and seals this 18th day of September, 1905.

M. W. ACHESON, [SEAL.]
GEO. M. DALLAS, [SEAL.]
GEO. GRAY, [SEAL.]
Circuit Judges.

4 (Indorsed:) U. S. Circuit Court of Appeals, Third Circuit. William J. Doyle and James G. Doak, trading as Doyle & Doak, Citizens of Pennsylvania, Plaintiffs in Error, *vs.* London Guarantee and Accident Co. Limited, a corporation and citizen of Great Britain, Defendant in Error. Sur question of law certified to the Supreme Court. Filed September 18, 1905.

UNITED STATES OF AMERICA,
Third Judicial Circuit, sct:

I, William V. Williamson, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Statement of facts and question of Law, filed September 18th A. D. 1905, in case of William J. Doyle and James G. Doak, trading as Doyle & Doak, citizens of Pennsylvania, Plaintiffs in Error, *vs.* London Guarantee and Accident Company, Limited, a corporation and citizen of Great Britain, Defendant in Error, for the instruction by the Honorable the Supreme Court of the United States for the proper decision thereon: on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this third day of November in the year of our Lord one thousand nine hundred and five and of the Independence of the United States the one hundred and thirtieth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. 10. March Term, 1905. United States Circuit Court of Appeals, Third Circuit. William J. Doyle and James G. Doak, trading as Doyle & Doak, citizens of Penna. Plaintiffs in Error, *v.* London Guarantee and Accident Company, Limited, a corporation and citizen of Great Britain, Defendant in Error. Certified Copy. Sur question of Law certified to the Supreme Court.

Endorsed on cover: File No. 20,002. U. S. circuit court appeals, 3d circuit. Term No. 155. William J. Doyle and James G. Doak, trading as Doyle & Doak, *vs.* London Guarantee and Accident Company, Limited. Certificate. Filed December 4th, 1905. File No. 20,002.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 11 1907
JAMES H. McKENNEY,
CLERK.

No. 155. OCTOBER TERM, 1906.

IN THE

Supreme Court of the United States

William J. Doyle and James G. Doak, trading as Doyle & Doak,

vs.

London Guarantee & Accident Company, Limited.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

E. CLINTON RHOADS,
For Plaintiff in Error.

JOHN C. BELL,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 155.

William J. Doyle and James G. Doak, trading as Doyle & Doak.

vs.

London Guarantee & Accident Company, Limited.

BRIEF FOR PLAINTIFF IN ERROR.

FACTS.

This case comes before the United States Supreme Court upon a question certified by the United Circuit Court of Appeals for the Third Circuit.

The facts out of which this question arose are stated in the certificate from the lower court, but we take the liberty of making an additional statement, believing that whether this court may or may not take cognizance of additional facts, it is perfectly proper that any state of facts may be considered as an hypothesis by which the soundness of conclusions of law may be tested.

The London Guarantee and Accident Company issued a writ in *assumpsit*, and before filing any declaration they filed a petition asking for the inspection of books and papers, for the purpose of framing a declaration. This was resisted on the ground that the court had no jurisdiction to make the order asked for.

The defendants claimed that the only authority in a common law action, for the production of books and papers, was under Revised Statute 724, which provided

for the production of papers only after issue joined, and which further provided as its only penalty a judgment by default. The Circuit Court made the order. The defendants failed to produce books, and alleged their inability to produce them. The Circuit Court found that their failure to produce books and papers was not satisfactorily explained, finding among other things that the burden of proof was upon the defendants; and thereupon the defendants were found guilty of disobeying the other in question, and were adjudged guilty of contempt, and the order was made which was certified by the Court of Appeals.

THE QUESTION CERTIFIED IS—

> "Has the Circuit Court of Appeals jurisdiction upon the writ of error sued out by the defendants to review the above recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of court in disobeying the above recited order of court of June 25th, 1904, and imposing upon the defendants a fine of $250 on the specified condition and terms?"

ARGUMENT.

The question of law then is: Has the Circuit Court of Appeals jurisdiction to relieve from the imposition of a penalty for contempt for disobedience of an order which the Circuit Court had no authority to make?

The contention of the appellee is that the order in this case involves a "civil contempt," from which there is no appeal.

The authority of the United States Circuit Court of Appeals arises under the Act of 1891, and is as follows:—

> "SECTION 6. That the Circuit Court of Appeals established by this Act, shall exercise appellate jurisdiction to review by appeal or by writ of error; final de-

cision in the * * * existing circuit courts in all cases other than those provided for in the preceding Section of this act."

What is a "final decision" has been a matter of controversy, but the authorities justify the statement that when an order has been made which must be carried immediately into execution it is final, and it is not the less final because incident to some other litigation. It is not impossible to have two final decisions within the limits of one general matter of litigation.

The list of cases bearing on contempt includes a multitude, and undoubtedly there exists a conflict of authority. We shall consequently confine ourselves chiefly to the discussion of federal cases.

There is no magic about a contempt case which forbids the Appellate Courts to rectify a wrong. The difficulty has been to find the machinery. Long before the creation of the Circuit Courts of Appeal, the United States Supreme Court took what was practically an appellate jurisdiction through the medium of writs of *habeas corpus* and *certiorari*. This court thus relieved against orders which were void.

When the United States Circuit Courts of Appeal were established, their appellate jurisdiction included criminal cases. If then a proceeding in contempt is a criminal proceeding, that court has jurisdiction.

That proposition is not seriously denied, but it is contended that there are two kinds of contempt, criminal and civil. While this may be a convenient colloquial classification, it is not sound in view of the authorities, and the correct statement is that what are called civil contempts are not contempts at all, but mere remedies equivalent to an execution, the typical cases being an order for the payment of money equivalent to damages, and an order for the payment of alimony, or in a probate court, for payment of an award. When this is conceded no prac-

tical injustice is done, for such an order is usually a final order, or if it is not executed, can be controlled so as to await the conclusion of the suit.

Should we be in error in thus insisting that all contempts are criminal in their characteristics, we still insist that the *contumacy of a witness is* within the classification of criminal contempts, as pertaining primarily to the authority of the court as distinguished from the assertion of a private right.

Mr. Justice Black, of Pennsylvania very emphatically illustrates this in the celebrated Williamson case. He states in substance that if a witness swear falsely in a private cause, he would of course be guilty of perjury, and the criminal accusation would be a totally separate procedure. Why should it not also be, he asks, if instead of swearing falsely, the witness had refused to swear at all, and had thereupon became the subject of a proceeding in contempt.

Should the contention of the appellee prevail, the result would be that the court could make an order which it had no legal authority to make, and proceed as in this case, to an execution, with the result that the order could not be challenged because the contempt was not criminal, and as a civil contempt could not be challenged because, as it contends, the order was not final; and the only opportunity to appeal at all, would be at the end of the primary litigation, which would be long after the sentence contemplated by the order in the contempt proceedings had been executed.

From such a practical absurdity there must be some escape. The escape is, as we have said, first, that the contempt case is a criminal proceeding, and the order imposing a penalty is a final order in that proceeding; and secondly, that under the double classification, when an order in contempt is made imposing a penalty, it becomes a final order which is appealable.

We submit that a study of the recent cases of this court justifies our conclusions.

In the Hanks case, 194 U. S., 303, this court found that the testimony taken in the lower court, supposably under

Section 870 of the New York Code, was taken without the authority of law, and the decision in that case based upon the evidence thus taken was reversed. If, instead of the witness having permitted his testimony to be taken, he had refused to answer, it is possible that we are forced to the conclusion that the witness must be committed and remain in jail until this court shall have decided at the end of the main litigation that the inquiry was without jurisdiction.

In Bessette *vs.* Conkey, 194 U. S., 324, an appeal from the contempt proceeding was entertained, the contempt being the disobedience of a temporary restraining order, and we believe that case sustains the proposition that contempts are essentially criminal in their character. In this case the peculiarity was that the appellant was a witness only.

In the Christensen case, 194 U. S., 458, an appeal was entertained from a contempt, which arose from the disobedience of a preliminary injunction. In this case the appellant was a party. This case again sustains the proposition that a contempt is substantially a criminal proceeding, and that what are known as civil contempts are properly exceptions, and are substantially executions in the form of an attachment.

In the Alexander case, 201 U. S., 117, we find the principle announced that in a contempt proceeding of the class which might be called a civil contempt, when the transaction has passed to the stage of disobedience and penalty, the case becomes a final decision.

We respectfully submit that in cases in which a distinction is made between a witness and a party, that it is not meant that a party who becomes a witness is denied rights which a witness would have. To assert that when a defendant has a clerk who refuses to produce a paper there may be an appeal from the finding of disobedience, and if the defendant himself be called as a witness to produce the same paper under the same circumstances, he may be committed for contempt without any appeal, would, we submit, present an absurd situation, which the law would

not countenance. It might be perfectly correct to say that an order committing a witness for contempt would have no bearing upon the main litigation, and that as to the main litigation it might be an interlocutory order; but it by no means follows that when the plaintiff calls the defendant as a witness, the defendant is denied the right to appeal from a penalty following an unauthorized order.

This view is sustained in Lester *vs.* People, 150 Illinois, 408, where the person subject to the contempt proceeding was a party to the primary litigation.

We now proceed to a more detailed consideration of cases bearing upon the question of "final decree."

In Thompson *vs.* Dean, 74 U. S., 342, Chief Justice Chase discusses the question of final decree, and rules in that case that an order to transfer stock was final, and justified an appeal, notwithstanding there remained accounts to be settled. The opinion of the court in this case lays down the general test for finality of the decision, and subsequent cases have done little more than apply it.

Mr. Chief Justice Chase says, *inter alia*, the following:

> "In this case the decree directs the performance of a specific act, and requires it to be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification or change was possible after the term, except on rehearing or by bill of review in the Circuit Court or other appeal in this court * * * But it is insisted that this court has held that no decree which does not completely dispose of the whole cause is final, and that this decree though disposing completely of the controversy as to the ownership of the stock, is not final, because it directs certain accounts to be taken.

"It is true that this court has always desired that appeals be taken only from decrees which are not only final but complete; and has, upon one occasion, at least, directed the attention of the Circuit Court to the expediency and importance of refraining from making final decrees on any part of a cause, however important, until prepared to dispose of it completely. Such a course would undoubtedly save much inconvenience, both to the Circuit Court and this court, and diminish largely the expense of litigation to suitors.

"And it may be true, that under the influence of these considerations the degree of finality essential to the right of appeal has been sometimes pushed quite to the limit of construction. But we think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of Forgay *vs.* Conrad, and which we again declare in his own language: 'When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed.'

"The reasoning in the case just cited fully vindicates this rule, in our judgment, as a sound construction of the Acts of Congress relating to appeals, and is sustained by the authority of several decisions."

In Alexander *vs.* U. S., 201 U. S., 117, the principle for which we contend is ruled under circumstances which bring it very close to the case at bar. This was an appeal from an order to produce books and papers. The syllabus of the case states:—

"While such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court.

"If the witness refuses to obey and the court goes further and *punishes him for contempt there is a right of review*, and this is adequate for his protection without unduly impeding the process of the case."

The Supreme Court adopted the dictum of the United States Court for the District of Minnesota, as follows:—

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the *witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand.* I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

In the case of Bessette *vs.* Conkey, 194 U. S., 329, in discussing the question of contempt as incident to some remedial action, the court says:—

"The punishment is to secure to the adverse party the right which the court has awarded to him. He is

> the one primarily interested, and if it will turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in *setting aside the punishment* which was imposed for disobeying an order to which the adverse party was not entitled."

This dictum, read in connection with the foregoing authorities, would appear to establish the proposition that when the lower court undertook to compel obedience to an order secured by the complainant, and to which he was not entitled, the order became final, and justified a writ of error.

City of Eau Claire *vs.* Payson, 107 Fed. Rep., 552.

By the Court of Appeals for the Seventh Circuit, it was held that an order providing for the payment of money with no provision for return, was a final order, and as such appealable. The court said:—

> "The Supreme Court has not placed upon the words 'final decree' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction."

Bullock Electrical & Mfg. Co. *vs.* Westinghouse Co., 129 Fed. Rep., 105, was the case of the violation of an injunction; the court held:—

> "The willful violation of an injunction by a party to the cause is a contempt of court, which constitutes a criminal misdemeanor, and the proceeding to punish therefor is in its nature a criminal proceeding, entirely independent and distinct from the suit in which the injunction decree was entered, and a judgment of conviction therein is reviewable by writ of error, and not by appeal.
>
> "A judgment of a Circuit Court imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and if un-

conditioned and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error."

Judge Lurton says:—

"To say that he may pay his fine or endure his imprisonment and review the legality of the matter at some indefinite time in the future, is to deny in effect the right of review at all."

In re Lester, 150 Ills., 408.

In this case the view for which we contend was sustained. An order to produce books was made, and upon an appeal to the Supreme Court the appeal was dismissed. After that the lower court found the defendant guilty of contempt, and made an additional order imposing a penalty. This order was held appealable, notwithstanding it was incident to other litigation.

The authorities prove that all cases of contempt are primarily criminal in their nature, and are separable from any litigation to which they are incident.

We submit that there is considerable confusion in the cases, due to the use of the term "civil contempt," and we contend that all cases of disobedience to the orders of a court, which are properly contempts, are criminal cases, and that the term "civil contempt" is properly applicable to cases which are in substance executions, such as attachments for the payment of money, fines which are merely compensatory in their nature, orders for the payment of alimony, and orders for the payment of sums found to be due in probate courts and in similar cases.

New Orleans *vs.* Steamship Co., 87 U. S., 392.

In this case a fine was imposed for the destruction by the officials of the city of New Orleans of certain Steamship Company property. This appears to have been in

violation of an injunction. It was held that the imposition of the fine was not appealable, for the reason that the case was a criminal case. Mr. Justice Swayne said:—

> "The fine of $300 imposed upon the Mayor is beyond our jurisdiction. *Contempt of court is a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division of opinion."

This same proposition is stated in the celebrated case of Passamore, 8 Williamson, 26 Pa., page 9.

In this case the Supreme Court of Pennsylvania refused to entertain appellate jurisdiction, for the reasons stated in the New Orleans case. Mr. Justice Black also suggests an illustration which, if it may be adopted, would rule the case at bar.

> "It must be remembered that contempt of court is a specific criminal offence. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction, and the commitment in consequence is execution. This is well settled, and I believe has never been doubted. Certainly the learned counsel for the petitioner have not denied it. The contempt may be connected with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. The record of a conviction for contempt is as distinct from the matter under investigation when it was committed, as an indictment for perjury is from the cause

in which the false oath was taken. * * * If instead of swearing falsely he *refuses to be sworn at all,* and is convicted not of perjury *but of contempt, the same rule applies,* and with a force precisely equal."

Bullock *vs.* West, 129 Fed. Rep., 104.

The opinion of Judge Lurton in this case fully sustains appellant's position.

The case of Bessette *vs.* Conkey, 149, U. S., 329, read in connection with that of the Christensen Engineering Company, 194 U. S., 458, justifies the proposition that contempts are primarily criminal in their nautre.

In the Conkey case it was held that the conduct in that case which was the violation of an injunction, was to be regarded as punitive "like misconduct in the court room or *disobedience to a subpoena,* and as among those acts primarily directed against the power of the court."

In the Christensen case, the court referred "to the distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court."

In both of these case the term civil contempt is applied to cases where the fine was in the nature of a compensation.

The Appellate Court has authority to relieve from a void order.

There seems to be a distinction between the circumstances under which an Appellate Court will take cognizance of an appeal, when on the one hand it is a question of the proper exercise of jurisdiction, and on the other hand, a question of *want of jurisdiction.*

In re Chetwood, 165 U. S., 443: In this case a writ of *certiorari* was allowed in a contempt case, notwithstanding the court had not appellate jurisdiction. The court said, page 461:—

> "As in our opinion the Circuit Court exceeded its jurisdiction in thus proceeding, we are constrained to make the rule absolute. * * * Judgments in proceedings in contempt are not reviewable here on appeal or error, but they may be reached by *certiorari* in the absence of any other adequate remedy. The writ of *certiorari* will be allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them to refrain from prosecuting the one writ in the name of the bank and to dismiss the other, may be revised and annulled.
>
> Commonwealth *vs.* Perkins, 124 Pa., 36.

This was a *habeas corpus* proceeding to relieve from a contempt of court in which before issue joined the defendant refused to comply with an order for the inspection of his machine, the "Keely Motor," the order was reversed by the Pennsylvania Supreme Court.

Mr. Justice Paxson says:—

> "If the court below had jurisdiction of the parties and the subject matter, and the order in question was lawfully made, it possessed the power to enforce it by attachment. *It is almost needless to say that the converse of this proposition is equally true.*"

That a writ of error is the proper method of review is ruled by

Bullock *vs.* West, 129 Fed. Rep., 105;
Bessette *vs.* Conkey, 194 U. S., 324.

We therefore submit that the foregoing argument shows that:—

1. Contempts of court are in substance criminal cases, and as such the imposition of a penalty is a final decision of which the Court of Appeals has jurisdiction.

2. The term "civil contempt" is a misnomer; the correct statement being that a money execution which is enforced through the medium of an attachment, is primarily an execution.

3. Even in cases which have been called civil contempts, when the litigation reaches the point of an order, followed by a refusal to obey, which in turn is followed by the imposition of a penalty, the decision is final, and whether considered as a criminal case or not, the order imposing the penalty is appealable.

4. The authorities recognize the right of appeal from a *void* order, even where the right to appeal is otherwise in doubt.

5. The law will avoid the absurdity of any rule, the effect of which is to entertain an appeal from a void order, after a sentence thereon has been executed.

E. CLINTON RHOADS,
for Plaintiff in Error.

JOHN C. BELL,
of Counsel.

FILE COPY.

No. 155. OCTOBER TERM, 1906.

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
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JAN 11 1907
JAMES H. McKENNEY,
CLERK.

William J. Doyle and James G. Doak, Trading as Doyle & Doak, Plaintiffs in Error,

vs.

London Guarantee and Accident Company, Limited, Defendant in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

THOMAS RAEBURN WHITE,
For Defendant in Error.

Allen, Lane & Scott, Prs., Phila

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 155.

William J. Doyle and James G. Doak, trading as Doyle & Doak, Plaintiffs in Error,

vs.

London Guarantee and Accident Company, Limited, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

It is submitted that the Circuit Court of Appeals has not jurisdiction upon the writ of error to review the judgment recited in the certificate, because it was not a final judgment of the court below. In support of this position, the following subsidiary propositions are submitted:

FIRST.

The Circuit Courts of Appeals have jurisdiction to review the action of Circuit or District Courts by writ of error or appeal only after final judgment in the court below.

It is expressly provided in the statute establishing the Circuit Courts of Appeals, and will not be denied, that

writs of error to review the action of Circuit or District Courts can only be considered in the Circuit Courts of Appeals after final judgment in the court below. The Act of March 3d, 1891, ch. 526, 26 Stat. L., 828, provides:—

> "SEC. 6. That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law."

A final judgment or decree is one which leaves nothing further to be done in the case except execution of the judgment of the court.

Grant *vs.* Phœnix Life Ins. Co., 106 U. S., 429 (1882);

St. Louis, &c., Ry. Co. *vs.* Southern Express Co., 108 U. S., 24 (1883);

Robinson *vs.* Belt, 56 Fed. Rep., 328 (1893).

It matters not that the question sought to be reviewed involves an attack upon the jurisdiction of the lower court, an appeal or writ of error cannot be considered until after the final disposition of the case.

McLish *vs.* Roff, 141 U. S., 661 (1891).

SECOND.

The order of the Circuit Court which plaintiffs in error were adjudged to have disobeyed was not final.

On page 1 of the certificate is set forth the order entered by the Circuit Court of the United States for the Eastern District of Pennsylvania, commanding plaintiffs in error to produce certain books of original entry for the examination of defendant in error. This shows upon its face that it was an interlocutory order, entered in the

preliminary stages of the case to protect the defendant in error in a right claimed by it to inspect, before trial, the books of its opponent.

THIRD.

Contempt proceedings are of two classes, vindicatory and remedial.

The argument in this court must necessarily revolve about the question whether the order, adjudging the plaintiffs in error to be guilty of contempt, was final. As preliminary to the determination of this question, it is necessary to consider the nature of contempt proceedings. The inherent power of the courts to impose punishment for contempt is made use of for two purposes:—

1. To vindicate the authority of the court by punishing misbehavior in its presence, violation of its orders, &c.

2. To protect litigants by requiring their opponents to respect the rights which they are adjudged to possess, or to perform orders or decrees made for their benefit.

This dual purpose of instituting contempt proceedings has given rise to two well recognized classes of contempt cases. The first class consists of those undertaken sometimes on the court's own motion, for the purpose of punishing misbehavior in its presence, libels concerning its judicial action, disobedience of its orders, &c. The main feature of such proceedings is the vindication of the court's authority by the punishment of the offender. If they result beneficially to a suitor, it is only incidental. Such proceedings are usually termed "criminal contempts," and the action of the court in imposing the punishment is necessarily final. There is no way that the person convicted can purge himself of contempt save by paying his fine or suffering imprisonment.

The second class consists of those cases in which one party to litigation has disobeyed some order of the court,

made for the benefit of the other party. Such proceedings are instituted at the instance of the injured party, not primarily for the purpose of vindicating the authority of the court, or punishing the offender, but to reimburse the injured party for loss inflicted upon him or to compel obedience to an order made for his benefit. Proceedings of this nature are termed "civil contempts;" are held to be a part of the main suit between the parties, and are usually interlocutory in their nature. They are either mere executions, providing for the payment of money to the party injured; or, are cases in which the contemnor can purge himself of contempt and escape the threatened punishment by performing the order of the court.

In the case of

In re Chiles, 22 Wallace, 157, 168 (1874),

Mr. Justice Miller said:—

> "Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are 'disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.' Such has always been the power of the courts both of common law and equity. The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.
>
> "In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S., 234 (1903),

this court fully recognized this distinction between civil and criminal cases. Mr. Justice Brewer quoted with approval the language of Judge Sanborn *in re* Nevitt, 54 C. C. A., 622 (117 Fed. Rep., 448), as follows:—

> "Proceedings for contempt are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the Government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.
> * * *
>
> "A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. See also Rapalje on Contempts, Sec. 21."

FOURTH.

Vindicatory contempt proceedings are the only ones reviewable on writ of error by the Circuit Courts of Appeals prior to the termination of the main suit.

Vindicatory contempt proceedings, being criminal in their nature, are reviewable on writ of error by the Circuit Courts of Appeals, as a part of their criminal jurisdiction. It matters not whether the main suit between the parties is in equity or at law, or whether such suit has been terminated, because the imposition of punishment in vindicatory contempt proceedings is a final judgment in a criminal case.

Prior to the establishment of the United States Circuit Courts of Appeals there could be no review of vindicatory contempt proceedings. The Supreme Court had not jurisdiction in criminal cases (other than capital cases) save where the judges of the lower court were divided in opinion, and therefore, although upon *habeas corpus* proceedings they could, and sometimes did, consider the question as to whether a prisoner was held by authority of law, the right to review vindicatory contempt cases by writ of error, or on appeal, was universally denied.

Ex parte Kearney, 7 Wheat., 38 (1822);
New Orleans *vs.* Steamship Co., 20 Wall, 387 (1874);
Hayes *vs.* Fischer, 102 U. S., 121 (1880);
Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903).

The Circuit Courts of Appeals were given general appellate jurisdiction in criminal cases, and the question soon arose, whether, as a part of such criminal jurisdiction, vindicatory contempt proceedings could not be reviewed on writ of error. The law was in some confusion on this point, because of a doubt whether the declination of the Supreme Court of the United States to take jurisdiction of vindicatory contempt proceedings by writ of error or appeal was due only to its lack of criminal ju-

risdiction, or was rested upon the principle of the English cases that contempt proceedings are never reviewable by any court other than that in which they were originally conducted. The law on this point, however, was settled by the recent case of

Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903);

in which the whole subject of the jurisdiction of the appellate courts to review vindicatory contempt proceedings was carefully reviewed. It was pointed out that the reason the Supreme Court of the United States had never taken jurisdiction of such cases on writ of error or appeal was because they were criminal, and that court had no criminal jurisdiction. A question being certified by the Circuit Court of Appeals for the Seventh Circuit inquiring whether it had jurisdiction to review the judgment of the Circuit Court of the United States, finding a person not a party to the suit guilty of contempt, the question was answered in the affirmative. Vindicatory contempt proceedings being criminal cases, it was held that the final imposition of punishment in such cases could be reviewed on writ of error by the Circuit Courts of Appeals. The court, however, was careful to limit its decision to vindicatory contempt proceedings, having special reference to the imposition of punishment upon persons who were not parties to the suit. Toward the close of his opinion Mr. Justice Brewer said:—

> "So when, by Section 6 of the Courts of Appeals' Act, the Circuit Courts of Appeals are given jurisdiction to review the 'final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law,' and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be

held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the Circuit Courts of Appeals."

It is contended by the plaintiffs in error that any imposition of punishment in a contempt proceeding is necessarily a final judgment in a criminal case, and, therefore, reviewable by writ of error whether vindicatory or remedial. This contention ignores the distinction between criminal and civil contempt proceedings and is not sustainable by authority.

It is a principle well settled that the court which has imposed punishment as a coercive measure in a civil suit can afterwards remit the punishment, which it would not have the power to do were such cases criminal, because the pardoning power rests only in the President. In

Hendryx *vs.* Fitzpatrick, 19 Fed. Rep., 810 (1884), this was pointed out and a large number of authorities cited. The defendant had been committed for contempt, and the question was whether the court had the right to relieve him from the punishment. It was held that it could do so, because the case was remedial and civil and therefore the question of the pardoning power was not involved. In the course of its opinion the Circuit Court for the District of Massachusetts said:—

"The process of contempt has two distinct functions—one criminal, to punish disobedience; the other civil and remedial, to enforce a decree of the court and indemnify private persons."

In the case of

In re Nevitt, 117 Fed. Rep., 448 (1902), Circuit Court of Appeals, Eighth Circuit,

it was prayed, *inter alia*, that proceedings punishing certain judges committed for contempt might be stayed pending an appeal to the President for their pardon. As to this point the court held that the case being civil did not come within the pardoning power, saying:

> "Since that day (Hendryx *vs.* Fitzpatrick, 19 Fed. Rep., 811) there seems to have been no substantial dissent from the rule and practice that an order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land, and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding. City of New Orleans *vs.* New York S. S. Co., 20 Wall., 387, 392, 393, 22 L. Ed., 354; Hendryx *vs.* Fitzpatrick (C. C.), 19 Fed., 810; *In re* Debs, 158 U. S., 564, 596, 599, 15 Sup. Ct., 900, 39 L. Ed., 1092. In the last case Mr. Justice Brewer expressing the unanimous opinion of the Supreme Court, said:—
>
> " 'In brief, a court enforcing obedience to its order by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.' "

It will scarcely be contended that in the case at bar or any similar case it is not within the power of the court imposing the punishment to relieve from said punishment when its orders have been obeyed. If this be admitted, the argument of the plaintiffs in error must fail, as it is based upon the fundamental proposition that all judgments in contempt cases are criminal.

The imposition of punishment upon one not a party to

the suit for some misbehavior or disobedience is necessarily vindicatory and final as to him, and even if the punishment is imposed upon a party, if it is plainly done in vindication of the court's authority, for an act already accomplished, it is vindicatory and final; but if the order is made merely to compensate one party for loss inflicted by the other or for the purpose of coercing one into obeying an order of the court made for the benefit of the other, and it is within his power to escape punishment by obeying such order, this is remedial and not reviewable as a criminal case.

The true line of demarcation is suggested to be as indicated in the preceding sentence. Leaving out of account compensatory fines which are not involved here and considering only those cases in which the punishment imposed is a fine payable to the United States or imprisonment, if it is conditional upon the further disobedience of an order made for the benefit of one party to civil litigation, so that by submission to the authority of the court the party convicted will escape punishment, this is a remedial contempt proceeding, and if prior to the termination of the main suit, is interlocutory. In such cases it is the duty of the contumacious party to submit himself to the authority of the court until there has been a final decision in the case, when any errors which may have been made, either in the interlocutory or final orders, may be corrected by writ of error or appeal.

All the cases cited by appellants in error in support of their contention that all contempt cases are reviewable by writ of error were such as were clearly vindicatory and not remedial. In

> Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903),

in which this court decided that the Circuit Court of Appeals for the Seventh Circuit had jurisdiction of a contempt proceeding, the punishment imposed by the lower court was upon one Bessette, who was not a party to the suit. He had violated an order of the court, and to vindicate its authority he was convicted of contempt and fined

$50. The decision was expressly limited to "only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory."

In the

Matter of Christensen Engineering Co., 194 U. S., 458 (1903),

it appeared that the Engineering Company had been found guilty of contempt for disobeying a preliminary injunction. A fine of $100 was imposed for such disobedience, one-half to the United States and one-half to the complainant. The fact that one-half of the fine was payable to the United States as a punishment for an act already done, showed that the contempt proceeding was vindicatory in its nature, and the decision was expressly placed upon this ground. Upon petition for a writ of mandamus to compel the Circuit Court of Appeals to take jurisdiction, Mr. Chief Justice Fuller said:—

> "The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in Bessette's case, and disclosed by some of the cases referred to in the opinion. * * *
>
> "These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.
>
> "In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction."

In the case of

Alexander *vs.* United States, 201 U. S., 117 (1905),

the Circuit Court ordered a witness not a party to the suit to answer a question and produce certain books. The imposition of punishment upon a witness for contempt is necessarily final in every case, because, not being a party, he has no further interest in the proceedings. The action of the court as to him is separate and apart from the main suit. In this case Mr. Justice McKenna said:—

> "This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit."

The appeal, however, was taken from the order of the court directing the witness to answer the question, and it was held that it was too soon; even in cases where the proceeding concerns only the witness, there is no finality even as to him until the imposition of punishment.

The case of

Bullock Electric & Mfg. Co. *vs.* Westinghouse Electric & Mfg. Co., 129 Federal Rep., 105 (1904),

was one in which a party to the litigation had been fined $500 for contempt of court in disobeying a preliminary injunction. The decision was not in conflict with the principles heretofore discussed, as it appears from the report that the fine was payable to the United States as a punishment for an accomplished act and neither in compensation for any injury resulting nor to compel performance of any order of the court. Some of the expressions of the opinion are not entirely reconcilable with the position here assumed, but in so far as the *dicta* of the Circuit Judge appear to ignore the distinction between vindicatory and remedial contempt proceedings it is submitted he was in error.

New Orleans *vs.* Steamship Co., 20 Wall. 387 (1874),

was a case which arose under the following circumstances. A military mayor of New Orleans made a lease of certain

water front property to a steamship company. Subsequently, Military Order No. 11 of General Canby forbade such leases to be made. Thereupon the city authorities, another mayor having assumed office, tore down a portion of the improvements which had been erected by the steamship company, and gave notice that they rescinded the lease. The steamship company filed a bill in the Circuit Court of the United States for an injunction to restrain the city authorities from interfering with them, and also for damages for the injury which had been occasioned. The mayor of New Orleans thereupon filed a bill in a District Court of New Orleans asking that the steamship company be enjoined from rebuilding its improvements. Upon motion, the mayor was held to be in contempt of court for having taken such action and was sentenced to pay a fine of $300. Subsequently, the main suit in the Federal Court was finished, an injunction was issued, restraining the city from interfering with the property, and damages were decreed in the sum of $8000. An appeal having been taken from that final decree to the Supreme Court of the United States, it was sought to have the order imposing the fine upon the mayor reviewed and reversed. It was, of course, held that such contempt proceeding was vindicatory and criminal, and for that reason not reviewable by the Supreme Court of the United States. It was said by Mr. Justice Swayne:—

> "That part of the decree is as distinct from the residue as if it was a judgment upon an indictment for perjury in a deposition read at the hearing."

The question involved in the case at bar was not in any way considered.

The case of

In re Chetwood, 165 U. S., 443 (1896),

the only remaining Federal case relating to contempt proceedings cited by the appellants in error, was also a criminal case, in which punishment was imposed upon Chetwood and his counsel for suing out certain

writs of error contrary to the order of the court. The record was brought up by *certiorari* and the action of the lower court was annulled. The case was clearly vindicatory and did not partake in the slightest degree of a remedial contempt. The question at issue in the case at bar as to a right to review contempt proceedings for breach of interlocutory orders was not involved.

It thus appears that the only contempt proceedings reviewable by the Circuit Courts of Appeals on writ of error prior to the termination of the main suit, are such as are vindicatory and therefore criminal.

FIFTH.

Remedial contempt proceedings are a part of the main suit, and can be reviewed on writ of error or appeal only after final judgment in the court below.

Remedial contempt proceedings are held to be a part of the main suit between the parties; the orders of the court sought to be enforced are such as the parties must obey and submit to, whether erroneously made or not, until final disposition of the case, when they may be reviewed upon writ of error or appeal.

In

Hayes *vs.* Fischer, 102 U. S., 121 (1880),

a writ of error was sued out in the Supreme Court to review the action of the Circuit Court of the United States for the Southern District of New York, in imposing a fine upon a party to the action for violation of an injunction. The court did not decide whether the proceedings were remedial or vindicatory, but said, through Mr. Chief Justice Waite:—

> "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only."
>
> "If the proceeding below, being for contempt

was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *ex parte* Kearney (7 Wheat., 38) and the rule then established was followed as late as New Orleans *vs.* Steamship Company, 20 Wall., 387."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S. 324 (1903),

the distinction between vindicatory and remedial contempt proceedings, which is argued not to exist by plaintiffs in error, was clearly stated by Mr. Justice Brewer. In describing remedial contempts he said:—

"If in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled."

The only other case of similar nature to the one at bar, which has reached the Supreme Court, is that of

Heinze *vs.* Butte & Boston Consol. Mining Co., 194 U. S., 632 (1904) (Circuit Ct. of Appeals, 129 Fed. Rep., 274).

The facts of this case raised precisely the point now at issue. In the progress of certain litigation in the Circuit Court of the United States for the District of Montana, an order had been made upon Heinze and other defendants requiring them to permit certain representatives of the plaintiff

to survey, examine and inspect certain underground workings and openings of mining claims, the subject matter of the litigation. Having attempted in vain to have said order reviewed on appeal or writ of error Heinze and his associates refused to obey. They were thereupon adjudged to be guilty of contempt. In the judgment of contempt it was provided that the defendants should be committed to prison, but only until such time as they should give the necessary orders and make the necessary provisions for the examination which the court had commanded. In that event, they should also be released from their fines. Circuit Judge Morrow delivered an elaborate opinion, in which he decided that the Circuit Court of Appeals had no jurisdiction because the judgment of the lower court was interlocutory. He found that the contempt proceedings were remedial, being instituted for the purpose of coercing the defendants into the performance of an order made for the benefit of the other party to the litigation. It was further pointed out and especially relied upon that compliance with the order of the court would relieve the defendants from the consequences of their misbehavior. A petition for a writ of *certiorari* to bring the record to the Supreme Court of the United States for review was denied. It appears from an examination of the paper books that the case was elaborately argued and that counsel for petitioners especially contended that the contempt proceedings constituted a criminal case, and for that reason the Circuit Court of Appeals had jurisdiction. If the question was then considered by this court, the case clearly will govern the one at bar. The opinion of Circuit Judge Morrow is very suggestive, and a portion of it is here quoted: —

> "It appears from these decisions that the Supreme Court draws a distinction between a contempt proceeding where the court is called upon to vindicate its authority and dignity and where the enforcement of its order and decrees are, to all intents and purposes, orders in the course of the cause based on the

questions involved as to the legal rights of the parties.

"* * * In the present case the order of the court provided, in substance, that the Butte and Boston Consolidated Mining Company, through its agents and representatives, should be permitted, during a period prescribed in the order, to survey, examine and inspect certain underground workings from the Rarus, Johnstown and Pennsylvania claims, beneath the surface of the Michael Devitt claim, owned by the complainant; and for that purpose such representatives of the complainant were to be permitted to remove or open all doors, bulkheads, or other obstructions which might be found in said premises, obstructing and preventing such examination and survey. The order was for the purpose of enabling the complainant to maintain its legal rights in said premises in the pending suits. The action of the appellants in refusing to comply with this order of the court was a resistance on their part to an adjudicated right in favor of the complainant. But it was provided in the judgment of contempt that the commitment should continue only until they should consent to the inspection, examination and survey of the underground workings specified in the order, and until they should give the necessary orders and provide the necessary means for making such examination, inspection and survey, and should permit the removal of the obstructions provided to be removed in said order, or until the further order of the court. It was further provided that, when the appellants should comply with the order of the court, the order should be discharged as to both fine and imprisonment against each and all of said parties, and none of the parties should be further held or chargeable thereunder. As said by the courts *in re* Nevitt, 117 Fed. Rep., 461; 54 C. C. A., 635:—

" 'They carry the keys of their prison in their own pockets. Governments are founded to administer

justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised.'

"No constitutional right is denied to the appellants in this case. They are not required to furnish evidence against themselves. They are simply to unbar their doors, stand aside, and allow the representatives of the complainant to ascertain whether in the depths below the surface of their own property the defendant in the suit in which this controversy has arisen is not engaged in extracting and carrying away the wealth of the property. The complainant is simply asking to be allowed to establish and protect its own property and rights, and it would be a miserable failure of justice if the court has not the power to enforce obedience to its orders in such a proceeding." * * *

"The conclusion we reach is that the judgment of contempt of court which the appellants seek to have reviewed upon the present writ of error is a judgment in a civil proceeding; that it is remedial and coercive in its execution, and that it has been entered by the court for the purpose of enforcing the private rights of the complainant judicially determined in its favor; and that the appellants are subject to its terms and conditions. It follows that it is a judgment that cannot be reviewed upon this writ of error, and the writ of error is therefore dismissed, with costs to the defendant in error."

The attention of the court is also invited to the case of

King *vs.* Wooten, 54 Fed. Rep., 612 (4 C. C. A., 519) (1893).

in which it appeared that a sheriff and others had been adjudged to be in contempt for interfering with property in the hands of a Receiver of the Federal Court. It was expressly provided in the order that after payment

of costs, and obedience to the order, the sheriff and his associates should be purged of contempt. The Circuit Court of Appeals dismissed an appeal from this order, it having been taken before final judgment in the court below.

Attention is also called to the case of

In re Nevitt, 117 Fed. Rep., 448 (1902),

in which it appeared that certain county judges had been committed to prison until they should obey a mandamus issued by the Circuit Court of the United States ordering them to levy certain taxes. Obedience to the order would release them from the imprisonment. It was held that the case was not reviewable on *habeas corpus* by the Circuit Court of Appeals. The denial of the writ was placed on the ground that the case could not have been reviewed directly by writ of error, the contempt proceeding being interlocutory, and therefore it could not be indirectly reviewed on *habeas corpus*, as the Circuit Court had jurisdiction of the case and its action was within its legal powers. A portion of the language of the court has already been quoted, it having been incorporated into the opinion of this court in Bessette *vs.* W. B. Conkey Co., *supra*. Further on in its opinion the court said:—

> "The result is that the prayers of the judges of the County Court of St. Clair County must be denied. But they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets. Governments are founded to administer justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised. The court whose duty it was to hear and determine this case was left no alternative, under the controlling decisions of the Supreme Court, but to render the judgment and to issue the

mandamus, which these judges are disobeying when the plaintiffs in these judgments prayed for that action, because under the law and under those decisions these plaintiffs had the legal right to that relief. It was the duty of the Circuit Court, and not that of these county judges, to determine whether or not they should levy this tax for the collection of these judgments, and the responsibility for that levy rests upon that court or upon the Supreme Court of the United States, whose decisions rendered its action imperative, and not upon the judges of this county court. Their duty as citizens and officers will be discharged when they comply with the mandate of the Circuit Court. Good citizenship demands the subordination of all our wills and acts to the judgments and orders of the courts which we have established to determine and enforce the rights of all our citizens, even though our private judgment does not always coincide with that of the courts which determine our rights and administer our remedies."

It is therefore submitted that remedial contempt proceedings are not reviewable until after final judgment in the principal case.

All such interlocutory orders and decrees will, however, be reviewed by the Appellate Courts when considering the case after final decree by writ of error or on appeal. In

Worden *vs.* Searles, 121 U. S., 14 (1886),

a preliminary injunction was granted, restraining the infringement of certain patents. The preliminary injunction was disobeyed by one of the parties to the suit, who was adjudged to be in contempt and was fined, not in vindication of the court's authority, but to reimburse the plaintiff for his loss. After final disposition of the case in the court below, it was taken to the Supreme Court by appeal, and there the action of the lower court in granting the preliminary injunction and imposing the fine for disobedience of it was reviewed and

reversed. It was contended that the Supreme Court had no jurisdiction to review these preliminary orders. In reply to this contention, Mr. Justice Blatchford said:—

> "We have jurisdiction to review the final decree in the suit, and all interlocutory decrees and orders."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (page 329) (1903),

Mr. Justice Brewer said:

> "If it should turn out on appeal from the final decree in the case that the original (interlocutory) order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled."

SIXTH.

The judgment in the contempt proceedings in the case at bar was remedial and coercive.

It clearly appears, from an examination of the order set forth on page 2 of the certificate, that the contempt proceeding which the plaintiffs in error desire to have reviewed was not vindicatory but remedial and coercive. The defendants were found guilty of contempt for disobeying a previous order found on page 1 of the certificate. There was, however, no final imposition of punishment in vindication of the court's authority; on the contrary, the order was in the alternative; if the defendants should produce the books, as ordered, before a day named, they should suffer no penalty save the payment of costs. If, however, there was a second refusal they were to pay a fine or to suffer imprisonment. This judgment was coercive and remedial; its sole purpose was to compel the plaintiffs in error to perform the order of the court. Not merely by implication but by express

terms, penalties were to be inflicted only in the event of further disobedience. None had been imposed at the time the writ of error was sued out, and none would follow, except in the event of further defiance of the court's authority. The judgment was therefore interlocutory within the meaning of the cases cited, and not reviewable until after the final termination of the main suit.

SEVENTH.

On principle this order should not be reviewable.

Courts exist for the purpose of determining and enforcing the rights of parties litigant in an orderly and legal manner. In order that this may be done, it is necessary for them to have and exercise authority over all persons who appear before them. If, at the conclusion of litigation, an error appears to have been committed this may be corrected by a higher tribunal, but the power to require parties to submit to the court's orders while the case is progressing to a determination is essential to the peaceable settlement of controversies. A different rule would not only give rise to confusion and violence, but would result in a practical denial of justice.

Scarcely less vexatious would be the delay occasioned if it were within the power of a party to the litigation to review by writ of error every interlocutory order made in the progress of a civil suit. It has been held by the Supreme Court of Pennsylvania that a law giving such right of appeal from interlocutory orders is a denial of the constitutional right to speedy justice.

Kurrie *vs.* Cottingham, 209 Pa., 12 (1904).

But if a litigant may refuse to obey interlocutory orders, and upon threat or imposition of punishment to compel obedience, remove the case by writ of error to a higher court he accomplishes the same result.

Vindicatory contempt proceedings are separate and apart from the main suit, and their review by a higher court does not delay or interfere in any way with the progress of the case in the court below. But if contempt

proceedings instituted to compel obedience to an interlocutory order made for the benefit of one of the parties may be reviewed by writ of error, the main suit is necessarily at a standstill until this preliminary question has been determined.

The case at bar is an excellent illustration of the vexatious result of such a rule. (See report of the case in 134 Federal Reporter, 125.) The defendant in error issued certain policies of insurance to the plaintiffs in error insuring them against liability sustained by reason of accidents happening to workmen in their employ. Premiums payable to the insurance company were to be based upon the actual amount of wages paid by the insured to their employees. In order to protect the company in its claim to the premiums, the insured covenanted in their policy that they would exhibit their books for examination by the company at all reasonable times. The company having begun suit for its premiums, contending that the insured had not correctly reported the amount of wages, claimed the right to examine the books according to the contract, which examination necessarily had to be made in advance of trial by an expert accountant. The court having granted the petition, the order having been disobeyed and the contempt proceedings instituted by virtue of such disobedience having been removed to the Circuit Court of Appeals and thence by certificate to this court, it is plainly seen for how long a period of time a suit may be halted, pending the determination of a purely interlocutory and preliminary question, which has to do solely with the method of proof. It is submitted that no such right of review should exist in such case.

But it is argued that it would be a denial of justice not to permit these contempt proceedings to be reviewed, because in the meantime plaintiffs in error are obliged to pay a fine or suffer imprisonment. The answer to this contention is that the plaintiffs in error "carry the keys of their prison in their own pockets." They have but to obey the order of the court, produce their books for examination as ordered and they are relieved

from any penalty. It is their duty, as good citizens, to obey the court's order. "Good citizenship demands the subordination of all our wills and acts to the judgments and orders of the courts which we have established to determine and enforce the rights of all our citizens, even though our private judgment does not always coincide with that of the courts which determine our rights and administer our remedies."

EIGHTH.

The question propounded by the Circuit Court of Appeals should be answered in the negative.

The reasons for the final conclusion may be summarized as follows:—

1. The Circuit Courts of Appeals have jurisdiction to review cases by writ of error only after final judgment.

2. The order disobeyed by the plaintiffs in error was interlocutory.

3. Contempt proceedings for disobedience of interlocutory orders are reviewable in Circuit Courts of Appeals by writ of error only when they are vindicatory or if remedial after final judgment in the principal case.

4. The contempt proceedings in the case at bar were remedial and coercive, and, being part of the main suit, were interlocutory, and are not reviewable until after final judgment in the court below.

THOS. RAEBURN WHITE,
For Defendant in Error.

Supreme Court of the United States.

No. 155.—October Term, 1906.

William J. Doyle, and James G. Doak, trading as Doyle & Doak, *vs.* London Guarantee and Accident Company, Limited.	On a certificate from the United States Circuit Court of Appeals for the Third Circuit.

[February 25, 1907.]

Mr. Justice Day delivered the opinion of the Court

This case is here upon certificate from the Circuit Court of Appeals for the Third Circuit. From the facts stated it appears that William J. Doyle and James G. Doak were adjudged guilty of contempt of court in the Circuit Court of the United States for the Eastern District of Pennsylvania. After the bringing of the action, upon the petition of the London Guarantee and Accident Company, Limited, the plaintiff below, the court made the following order:

"And now, June 25th, 1904, the court orders the defendants to produce, within twenty days, in the office of the clerk of said court, their pay sheets, time books, cash books and all other books of original entry which contain information as to the amount of compensation paid to employees of themselves or of their subcontractors or of any other persons contemplated in the contracts upon which suit is brought in this case during the period of said contracts as set forth in the petition filed."

After that order was made the certificate recites:

"Thereafter the plaintiff presented to the court a petition alleging disobedience by the defendants of the above order and praying that an attachment issue against them for contempt of court. Thereupon the court granted a rule upon the defendants to show cause why an attachment should not issue against them for contempt of court by reason of their violation and disobedience of said order. To this rule the defendants filed an answer under oath, denying intentional non-compliance with said order and stating that they were not able to produce all the books and papers called for, because upon a thorough search the absent ones could not be found, and averring their belief that they were accidentally lost or by mistake were destroyed at a time when alterations were made in their office and a removal of its contents to another place occurred. Subsequently, to wit, on January 3d, 1905, upon the hearing of the rule, the court gave and entered judgment that the 'defendants are guilty of contempt in disobeying the order referred to,' and further adjudged as follows:

"If the defendants produce in the office of the clerk of the Circuit Court on or before January 15th, 1905, the ledger of 1902–4, the pay rolls or time sheets from March to May 28, 1903, and the cash book from May 28 to December 1, 1902, or if they produce the cash book alone, they are ordered to pay no more than the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment to suffer imprisonment in the jail of this county for the period of sixty days. If the foregoing books and papers are not produced on or before January 15, the defendants are ordered to pay a fine of two hundred and fifty dollars, and also the cost accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment to suffer imprisonment in the jail of this county for the period of sixty days."

A writ of error was allowed to the Circuit Court of Appeals. Upon the facts stated the following question was certified to this court:

"Has the Circuit Court of Appeals jurisdiction upon the writ of error sued out by the defendants to review the above recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of court in disobeying the above recited order of court of June 25th, 1904, and imposing upon the defendants a fine of $250.00 on the specified conditions and terms?"

Cases involving the right to review orders of the Federal courts in matters of contempt have been so recently before this court that an extended discussion of the principles involved is unnecessary. *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324; *Matter of Christiansen Eng. Co.*, 194 U. S. 458; *Alexander* v. *United States*, 201 U. S. 117.

In *Bessette* v. *W. B. Conkey Co.*, *supra*, a question was certified here from the Circuit Court of Appeals of the Seventh Circuit, involving the jurisdiction of that court to review an order in a contempt proceeding finding the petitioner guilty of contempt for violation of an order of the Circuit Court, and imposing a fine. In that case the subject underwent a full examination and the previous cases in this court were cited and reviewed. As a result of those decisions we deem it settled that an order punishing for contempt made in the progress of the case, when not in the nature of an order in a criminal proceeding, is regarded as interlocutory and to be reviewed only upon appeal from a final decree in the case. *Matter of Christiansen Eng. Co.*, 194 U. S. 458. In *Bessette* v. *Conkey Co.*, *supra*, it was pointed out that this court had no jurisdiction to review judgments in contempt proceedings criminal in their nature under the power to punish for contempt defined by Congress, 1 Stat. 83, and limited by the act of March 2, 1831. 4 Stat. 497, Rev. Stat. sec. 725.

The right to review a judgment in a contempt proceeding in the Circuit Court of Appeals was derived from the Circuit Court of Appeals act, section 6, of which Mr. Justice Brewer, speaking for the court in the *Bessette* case, said:

"So when, by section 6 of the Courts of Appeals act, the Circuit Courts of Appeals are given jurisdiction to review the 'final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,' and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of the opinion that there is a right of review in the Circuit Court of Appeals."

And again, in the same case, it is said:

"As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves ceased to have controlling authority, and whether the Circuit Courts of Appeals have authority to review proceedings in contempt in the District and Circuit Courts depends upon the question whether such proceedings are criminal cases."

It therefore appears that the only right of review given to the Circuit Court of Appeals in contempt proceedings is derived from the act giving that court such right in criminal cases. In the course of the discussion in the Bessette case it is said that proceedings for contempt may be divided into those which have for their purpose the vindication of the authority and dignity of the court, and those seeking to punish parties guilty of a disregard of such orders as are remedial in their character, and intended to enforce the rights of private parties, to compel obedience to orders and decrees made to enforce their rights and to give them a remedy to which the court deems them entitled. And it is said that the one class is criminal and punitive in its nature, in which the Government and the public are interested, and the other civil, remedial and coercive in its character, in which those chiefly concerned are individuals whose private rights and remedies are undertaken to be protected and enforced. From the discussion in that case it clearly appears that proceedings which are criminal in their nature and intended for the vindication of public justice, rather than the coercion of the opposite party to do some act for the benefit of another party to the action, are the only ones reviewable in the Circuit Court of Appeals under its power to take jurisdiction of and determine criminal cases.

In that case, and in the cases generally, where the right of review has been recognized, the party prosecuted has been other than one directly interested in the suit and brought into it for the purpose of punishing a known violation of an order in defiance of the authority and power of the

court. In such case the proceeding is entirely independent and its prosecution does not delay the conduct of the action between the parties to final decree. True it is that in some cases, as in the Christiansen case, 194 U. S., the punishment for contempt which has been held reviewable is for a past act of a party in violation of an order made for the benefit of the other party. In that case one-half of the fine imposed went to the United States, and was not intended for the enforcement of an order in favor of a party, but rather for the vindication of the authority of the court, and punishment for an act done in violation of the court's order, and it was held that such judgment was in a criminal proceeding and reviewable in the Circuit Court of Appeals. In the present case, while it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and, in that event, there is no final judgment of either fine or imprisonment.

"It may not be always easy," said the learned justice, speaking for the court in the Conkey case, "to classify a particular act as belonging to either one of these two classes [speaking of vindicatory and remedial proceedings]; it may partake of the character of both. A significant and general determinative feature is that the act is by one party to the suit, in disregard of a specific order made in behalf of the other; yet sometimes disobedience may be of such a character and in such a manner as to indicate a contempt of the court other than a disregard of the rights of the adverse party."

In view of the principles which we deem settled by the adjudications referred to, the question decisive of the present case, therefore, is: Was the judgment rendered in the contempt proceeding criminal in its nature, and having for its object the vindication of the authority of the court, or was it one in the nature of a proceeding to enforce an order seeking the protection of the rights of the party to the suit for whose benefit it was made?

The certificate does not fully indicate the character of the action in which the order was made; yet sufficient appears from which it is to be inferred that the action before the court was one in which it was necessary for the protection of the plaintiff that an inspection of the books and papers of the defendant be had. The defendants were required to produce in the office of the clerk the time books, cash books, etc., containing information as to the amount of compensation paid to the employees of themselves or subcontractors, or to any other persons contemplated in the contracts upon which suit was brought. The court deemed it proper, in view of certain contracts between the parties, that these books and papers be opened for inspection for the benefit of the plaintiff. And, after hearing the parties, it was adjudged that if they produce the books they

should be liable only for the costs of the proceedings or in default of payment suffer imprisonment for a period of sixty days. And if the books and papers were not produced on or before January 15 a fine of $250 and costs was imposed or in default of payment thereof imprisonment in the county jail for the period of sixty days. We think it is apparent from a perusal of this order, in the light of the statement of facts under which it was made, that its object and purpose was to obtain information for the benefit of the plaintiff in the suit to which the court found it entitled, and that the punishment of fine and imprisonment, which was in the alternative, was imposed, not for the vindication of the dignity or authority of the court, in the interests of the public, but in order to secure, for the benefit of the plaintiff, a compliance with the order of the court as to the production of the books. The case clearly falls within the class of contempt proceedings which are not criminal in their nature, and are not reviewable before final decree. The proceeding is against a party, the compliance with the order avoids the punishment, and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding.

It may be true, as said in argument, that unless the party complies with the order he may be subjected to fine or imprisonment, and if the order cannot be reviewed until after final decree it may come too late to be of any benefit to the party aggrieved. But the power to punish for contempt is inherent in the authority of courts, and is necessary to the administration of justice and part of the inconvenience to which a citizen is subject in a community governed by law regulated by orderly judicial procedure. As has been said, while the party may suffer imprisonment, "he carries the keys of the prison in his own pocket," (*In re Nevitt*, 117 Fed. Rep. 461,) and by compliance with the order of the court may deliver himself from punishment.

But whatever the hardship, the question now before the court is as to the authority of the Circuit Court of Appeals to review judgments in contempt proceedings. In the Circuit Court of Appeals act, as construed by this court, the jurisdiction of the Circuit Court of Appeals is extended to the right to review judgments entered before final decree in the action out of which the contempt proceedings arose where the order is final and in a proceeding of a criminal nature. Beyond this, the jurisdiction of the court has not been carried, and, in our opinion, no right of review exists in such a case as is shown in the certificate before us, in advance of a final decree in the case in which the order was made.

It is urged by counsel for plaintiff in error that the only authority of the Circuit Court to make an order for the production of books and papers in a common law action is under section 724 of the Revised Statutes of

the United States, providing for the productions of papers after issue joined. But the question certified is not as to the lack of authority of the Circuit Court to make the order for want of jurisdiction, a question which might arise upon a *habeas corpus* proceeding, but concerns the right of the Circuit Court of Appeals to review an order made in the Circuit Court, undertaking to punish for contempt for violation of an order made in other than a proceeding of a criminal character. The Court of Appeals Act of 1891 gives no right to review other than final judgments in the District and Circuit Courts, except in injunction orders, as provided in § 7 of the act. *McLish* v. *Roff*, 141 U. S. 661, 668.

For the reasons stated we think the Circuit Court of Appeals has no jurisdiction to review the judgment set forth in the certificate, and the question certified will be answered in the negative.

Mr. Justice PECKHAM took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.